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No. 90-1104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH, *et al.*,
Petitioners,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA), *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS CITY OF DETROIT, MAYOR COLEMAN A. YOUNG, THE DETROIT POLICE DEPARTMENT, CHIEF OF POLICE WILLIAM L. HART, AND THE DETROIT BOARD OF POLICE COMMISSIONERS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that Petitioners, whose constitutional challenge to layoffs by the Detroit Police Department had previously been determined to have been devoid of merit, were not "prevailing parties" for purposes of entitlement to attorney's fees under 42 U.S.C. § 1988.

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PRELIMINARY STATEMENT

Respondents City of Detroit, Mayor Coleman A. Young, the Detroit Police Department, Chief of Police William L. Hart, and the Detroit Board of Police Commissioners (referred to herein as the "City Defendants") submit this brief in opposition to the petition for a writ of certiorari.[1]

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[1] Respondents Detroit Police Officers Association ("DPOA") and David Watroba are separately represented.

COUNTERSTATEMENT OF THE CASE

Petitioners (referred to herein as "Plaintiffs"), a class of black police officers, brought suit in 1980 under 42 U.S.C. § 1983, claiming that their layoffs by the Detroit Police Department in 1979 and 1980 violated an "affirmative duty" assertedly owed by Detroit to eliminate the effects of past discrimination and were therefore unconstitutional.[2] Through a judgment entered by the District Court in 1984, Plaintiffs gained recall to employment with full seniority.[3] However, Plaintiffs' challenge to the layoffs was ultimately determined by the Court of Appeals to be devoid of merit; this Court has declined review.[4]

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[2] Shortly after taking office, Detroit Mayor Coleman A. Young, in 1974, initiated affirmative action measures, including minority recruiting and race-conscious promotions, to increase black representation at all levels of the police department (A. 30).

In a separate suit, maintained by a group of white officers challenging Detroit's affirmative action promotions to the rank of police lieutenant, the District Court credited evidence—offered by Detroit in defense of its program—that the Department had intentionally discriminated against blacks in police hiring up to the years 1967-68. *Baker v. City of Detroit*, 483 F. Supp. 930, 992 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). *Baker/Bratton* established that Detroit had a compelling interest in eliminating remaining effects of its pre-1968 past discrimination, which warranted use of race-conscious measures in promotions.

Detroit has not employed race-conscious measures in connection with layoffs. Rather, it has adhered strictly to the inverse seniority provision contained in its collective bargaining agreement with the DPOA. The black officers affected by Detroit's 1979 and 1980 layoffs were hired between 1975 and 1978 (A. 30); no evidence was presented that any of them had been a victim of the pre-1968 hiring discrimination established in the *Baker/Bratton* litigation (A. 54).

[3] *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984) (A. 23).

[4] In an opinion dated April 9, 1990, the Court of Appeals determined that Plaintiffs' "claims should have been dismissed below as a matter of law"; that their "theory of liability is without merit"; and that the layoffs, made pursuant to a *bona fide* rule of

Plaintiffs have nevertheless persisted in their claim to attorney's fees under 42 U.S.C. § 1988. The Court of Appeals determined that, in view of its prior holding that Plaintiffs' constitutional claim was devoid of merit, Plaintiffs are not "prevailing parties" in this litigation and accordingly are not entitled to attorney's fees under 42 U.S.C. § 1988.[5]

Plaintiffs now contend that, notwithstanding the Court of Appeals' holding that their challenge to the layoffs was devoid of merit, they remain "prevailing parties" under 42 U.S.C. § 1988 in that they gained recall to employment through the District Court's pretrial rulings and judgment and remain so employed today.[6] They ignore that

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inverse seniority, were constitutional. *NAACP v. DPOA*, 900 F.2d 903, 911, 914 (6th Cir. 1990) (A. 176, 192-93, 198), *cert. denied*, No. 90-569, —— U.S. ——, 111 S.Ct. 514 (November 26, 1990).

[5] *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990) (A. 200).

[6] The various rulings of the District Court claimed by Plaintiffs to support their status as "prevailing parties" are described here briefly:

In a pretrial order of November 17, 1981, the District Court held via partial summary judgment that the *Baker/Bratton* litigation would be preclusive of further litigation regarding the issue of Detroit's pre-1968, intentional discrimination. *NAACP v. DPOA*, 525 F. Supp. 1215 (E.D. Mich. 1981) (A. 1, 14). This purely procedural ruling granted the Plaintiffs no relief.

In a temporary restraining order of November 28, 1983 (amended by stipulation on December 1, 1983), the District Court ordered that the recall rights of the laid off officers be carried forward *pendente lite* (A. 16, 19); the applicable collective bargaining agreement provided that recall rights of laid off officers would otherwise have expired after three years. This order, which merely preserved the *status quo*, did not establish Plaintiffs' entitlement to relief on any aspect of their claim.

In a pretrial order of February 24, 1984, the District Court held via another partial summary judgment that the layoffs violated what it perceived as Detroit's continuing, "affirmative duty" to

only Detroit's compliance with these erroneous rulings made this possible. As set forth below, Plaintiffs' claim that they can win on attorney's fees while losing their case is patently wrong. Their assertion of Circuit conflict on this issue is transparently wrong and overlooks numerous appellate cases which squarely foreclose fee entitlement based on purported benefits gained through a defendant's compliance with an order which is reversed on appeal.

REASONS FOR DENYING THE WRIT

I. THE ASSERTED CONFLICT AMONG THE COURTS OF APPEALS IS NON-EXISTENT

Under this Court's decisions, parties who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit" may be recognized as "prevailing parties" for purposes of attorney's fees entitlement under § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Texas State Teachers v. Garland Independent School Dist.*, —— U.S. ——, 109 S.Ct. 1486, 1491 (1989), quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). *Absent* a decision on the merits, parties may be considered to have

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eliminate the effects of past discrimination in that they reduced the level of black representation among police officers (A. 21).

The District Court, in an opinion dated July 25, 1984 incorporating its February 1984 ruling on liability, held the layoffs unconstitutional. *NAACP v. DPOA*, 591 F.Supp. 1194 (E.D. Mich. 1984) (A. 23, 36-37). Through a subsequent order, the District Court entered final judgment on November 8, 1984 and directed that all officers still laid off be recalled with full seniority by June 24, 1985. *NAACP v. DPOA*, 36 Fair Emp. Prac. Cas. (BNA) 434 (E.D. Mich. 1984).

The City Defendants took a timely appeal from the November 8, 1984 judgment. During the pendency of the appeal, the recalls were completed as required by the District Court's order. By operation of the District Court's final judgment, in tandem with the 1983 *status quo* order which prevented expiration of Plaintiffs' recall rights *pendente lite*, Plaintiffs' were thus restored to employment.

prevailed when they vindicate rights through a settlement or consent judgment or without formally obtaining relief. *Maher v. Gagne*, 448 U.S. 122, 129 (1980).

Neither this Court, or any Court of Appeals, has accepted the proposition advanced by Plaintiffs: that a party may be recognized as prevailing based on relief secured in a trial court, notwithstanding that the party's favorable judgment has been reversed and notwithstanding the appellate court's ultimate determination that the party's claim was devoid of merit.

Plaintiffs argue incorrectly that the Court of Appeals' fee decision is contrary to the "catalyst theory" under which plaintiffs who have not formally obtained relief may be recognized as prevailing where their lawsuit has prompted action by defendants to meet their claims. As articulated in *Nadeau v. Helgemoe, supra*, fee entitlement under this theory involves a two-fold test requiring both that the fee-claimants' suit was "causally related to the defendants' actions which improved their condition" *and* that the fee claimants can be said to have "prevailed in a legal sense." 581 F.2d at 281.

In *Nadeau* itself, the fee claim was based on the entry of a consent decree which had obviated ultimate determination of the merits. In such a case, the court explained, the fee claimants could be said to have prevailed legally so long as their suit was not " 'frivolous, unreasonable, or groundless, or that the plaintiffs continued to litigate after it clearly became so.' " *Id.*, quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978). At the same time, the *Nadeau* court made plain that parties could not be viewed as legally prevailing where the merits of their claim had been determined adversely:

> If it has been *judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law,* then defendants

> must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

Id. (emphasis added).

Here Plaintiffs' suit did elicit the District Court's 1983 interim order which preserved their recall rights *pendente lite* and their recalls to employment as directed by the District Court's 1984 judgment. *See* note 6, *supra*. However, once the Court of Appeals determined that Plaintiffs' constitutional challenge to the layoffs was devoid of merit, it necessarily followed that any relief previously ordered by the District Court was not "required by law". Thus, *Nadeau*, which spawned the "catalyst theory", itself dictates the conclusion that Plaintiffs have "not prevailed in a legal sense."

The several cases cited by Plaintiffs as evidence of circuit conflict (Petition, 17-19) reflect only that the "catalyst" approach has generally been followed by the Courts of Appeals, including the Sixth Circuit. *See* Petition, 19, n.18. None of these decisions so much as suggests that the "catalyst" approach would support fee entitlement in the face of ultimate rejection of the merits of a plaintiff's claim.

Most specious is the Plaintiffs' assertion of conflict with *Public Citizen Health Research Group v. Young*, 909 F.2d 546 (D.C. Cir. 1990), a case where there had been no ultimate resolution of the underlying merits. The court succinctly stated that the catalyst theory "cannot apply where there has been a judicial determination on the merits" because "such a decision *would itself determine who was prevailing and make the catalyst notion irrelevant.*" *Id.* at 549 (emphasis added).

In *Guglietti v. Secretary of Health & Human Services*, 900 F.2d 397 (1st Cir. 1990), the court found it unnecessary to determine whether the plaintiffs had prevailed in a legal sense—the second prong of *Nadeau*—inasmuch as the fee claimants had failed to show a

causal relation between their suit and the benefit assertedly gained.

Clark v. Township of Falls, 890 F.2d 625 (3rd Cir. 1989), held that a party whose damage judgment had been reversed on appeal might still be recognized as "partially prevailing" based upon a prior settlement of his claim for injunctive relief. Apart from the settlement, the Third Circuit recognized that "when a judgment in favor of a plaintiff is reversed on the merits, that party is no longer a "prevailing party" under 42 U.S.C. § 1988 . . . ." *Id.* at 626. Here, unlike *Clark*, there has been no settlement of any aspect of the Plaintiffs' claim which could independently support prevailing party status. Rather, the entirety of Plaintiffs' claim has been determined devoid of merit.[7]

In *Heath v. Brown*, 858 F.2d 1092 (5th Cir. 1988), the Fifth Circuit upheld a determination that plaintiffs' § 1983 suit was the catalyst for changes in a challenged policy which had mooted their claims for injunctive and declaratory relief and obviated ultimate determination of the merits. Unlike here, the plaintiffs' underlying claims were not ultimately held to be without merit.

In *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), the court, based upon prior decisions of the Tenth Circuit, held that the catalyst theory requires that the fee claimant show not only that his suit was

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[7] The Court of Appeals' fee decision here is plainly incorrect in one respect. The Court of Appeals stated that its "decision on prevailing party status" was "limited to the case as a whole on the merits" and was not intended to foreclose Plaintiffs from seeking fees "for the more limited injunctive decrees of November 29, 1983 and December 5, 1983 (recall rights) or other limited injunctive decrees not appealed and reversed." (A. 202). The Court of Appeals' determination that Plaintiffs' suit was without merit and should have been dismissed as a matter of law precludes fee entitlement based on Detroit's compliance with the trial court's pretrial orders.

causally-related to the defendant's action *but also that he would have prevailed on the merits of his claim.*[8]

In *Dunn v. The Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), the court held plaintiffs disentitled to fees even though their suit prompted alteration of a challenged restriction on lay assistance in divorce cases which obviated a determination of the merits. The court concluded that the rule change, although elicited by the suit, was not "required by law". Here, where the Court of Appeals has held Plaintiff's constitutional challenge to have been wholly without merit, the relief gained by Plaintiffs under the District Court's orders was clearly not "required by law" and cannot support fee entitlement.

II. THE COURTS OF APPEALS HAVE CONSISTENTLY HELD THAT PARTIES WHO HAVE ULTIMATELY LOST ON THE MERITS ARE NOT ENTITLED TO FEES NOTWITHSTANDING THAT RELIEF GAINED UNDER INTERIM ORDERS MAY AS A PRACTICAL MATTER SURVIVE

Nadeau v. Helgemoe, supra, itself makes plain that, where there has been a determination that a party's suit was without merit, the party cannot be found prevailing. For their assertion of Circuit conflict, Plaintiffs rely on cases in which there was no such determination. At the same time, Plaintiffs make no mention of the cases—cited by the City Defendants in both courts below—

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[8] The Tenth Circuit view reflected in *Foremaster* and prior cases appears to conflict with *Nadeau* insofar as it requires a fee claimant—in a case where there has been no ultimate determination of the merits—to demonstrate that he would in fact have prevailed on the merits of his claim. *Nadeau* is not generally understood as requiring such a demonstration. *See Long v. Young*, 455 U.S. 961, 966 n.3 (1982) (Rehnquist, J., dissenting).

This conflict is no help to Plaintiffs here. Both views equally preclude prevailing party status where the merits of a party's claim have been determined adversely.

where such determinations have been made and moreover have been held to foreclose fee entitlement.

The Courts of Appeals are in complete agreement that the "catalyst theory" does not support fee recovery where plaintiffs have gained relief under a legal ruling later disapproved as incorrect. *See Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986); *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982); *Smith v. University of North Carolina*, 632 F.2d 316, 346-53 (4th Cir. 1980); *Harrington v. Vandalia-Butler Bd. of Education*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Ward v. County of San Diego*, 791 F.2d 1329, 1334 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

In *Palmer*, the Seventh Circuit explained the preclusion of fees in this setting as follows:

> [S]*uppose . . . that a plaintiff gets an injunction to which he has no legal right but the defendant complies pending appeal, thus conferring a benefit on the plaintiff. . . .* [T]*his kind of benefit cannot support a fee award.* "If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

Palmer v. City of Chicago, supra, 806 F.2d at 1322 (emphasis added).

In *Doe*, the Eleventh Circuit stated that the plaintiffs were not "prevailing parties"—notwithstanding the benefits gained through the district court's permanent injunction and declaratory judgment—because "any benefit flowing from their successes in the district court *was awarded under a mistake of law.*" *Doe v. Busbee, supra*, 684 F.2d at 1381 (emphasis added).

Here, as in *Doe*, Plaintiffs "have not ultimately prevailed on any legal issue, and *any relief entered by the district court was awarded under a mistake of law.*" *Id.* at 1383 (emphasis added). Plaintiffs were ordered recalled by the 1984 judgment order of the District Court, the District Court having erroneously found merit in Plaintiffs' constitutional challenge to the layoffs.

Plaintiffs' claim to be prevailing based on the District Court's various pretrial rulings (*see* note 6, *supra*) is of no avail. The District Court's 1981 pretrial summary judgment order (A. 1, 14), barring relitigation of issues resolved elsewhere, was a procedural ruling which yielded no relief even *pendente lite*. The same is true of the District Court's 1984 partial summary judgment order on the issue of liability (A. 21). The District Court's determination regarding liability was, in any event, decisively rejected by the Court of Appeals.

Nor can the District Court's 1983 temporary restraining order preserving Plaintiffs' recall rights *pendente lite* support fee entitlement. Such an order clearly did not support fee entitlement when it was entered, inasmuch as it did not, in and of itself, uphold Plaintiffs' entitlement to relief on any aspect of their claim. *See Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980). Like any other interim order preserving the *status quo*, its issuance presupposed the District Court's view that Plaintiffs were likely to prevail on the merits. The 1983 order, though not itself appealed by Detroit and not directly addressed in the Court of Appeals ultimate decision on the merits, was itself infected by the same incorrect view of the law as the District Court's final judgment which was reversed on appeal. The 1983 *status quo* order could not support fee entitlement consistent with *Hanrahan v. Hampton* in any event. While it operated in tandem with the District Court's incorrect final judgment to produce Plaintiffs' recall to employment, neither order

separately nor both together could operate to support fee entitlement in this case.[9]

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.[10]

Respectfully submitted,

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[9] For this reason, the Court of Appeals' decision was plainly incorrect insofar as it held open the possibility that Plaintiffs could be entitled to fees for work devoted to the *status quo* orders of November 29 and December 5, 1983.

[10] In order at long last to bring an end to this litigation, this Court would be well-warranted in granting the petition and affirming *per curiam* with a direction that the holding that Plaintiffs' claim was devoid of merit is preclusive of fee entitlement *for any aspect of the litigation*. Respondents would, of course, welcome such a disposition.